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No. 10-

IN THE

Supreme Court of the United States

CITY OF SANTA ROSA; RICHARD CELLI, Police Officer; TRAVIS MENKE, Police Officer; and PATRICIA MANN, Police Officer of the SANTA ROSA POLICE DEPARTMENT,

Petitioners,

v.

PATRICIA DESANTIS, Guardian Ad Litem; RICHARD DESANTIS, deceased, and as Guardian Ad Litem; DANI DESANTIS, a minor, TIMOTHY FARRELL, a minor; ADRIANNE DESANTIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should qualified immunity be denied to an officer forced to make a split-second decision to shoot a deranged man, believed to be armed, who continued to charge directly at the officer after a less lethal projectile failed to deter his progress because alternative force options were available to other officers at the scene but not to the individual officer?

2. Can the conduct of officers in making a split-second decision to shoot a deranged man, believed to be armed who charged at the officers after a warning shot from a less lethal weapon failed to deter his progress, evidence a purpose to harm without legitimate law enforcement purpose sufficient to support a Fourteenth Amendment claim against the officer?

3. Should a court deny qualified immunity based only on a portion of the testimony of the plaintiff that is taken out of context without consideration of the totality of her testimony when six police officers and an independent eye witness all testify to the fact such that no reasonable trier of fact based on the entire record would find in the plaintiff's favor?

LIST OF PARTIES

Petitioners and Defendants in this action are three individual police officers employed by the City of Santa Rosa – Rich Celli, Patricia Mann and Travis Menke and the City of Santa Rosa. Respondents and Plaintiffs are Patricia DeSantis individually and as guardian of Dani DeSantis and Plaintiff and Respondent Adrianne DeSantis.

The claim of plaintiff Timothy Farrell was dismissed and that decision has become final. Defendant Jerry Soares was voluntarily dismissed by the Plaintiffs prior to the underlying decisions at issue.

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OPINION BELOW

The 2-1 Memorandum opinion in this case, filed on April 28, 2010, was deemed not appropriate for publication. The Memorandum is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

Petitioners were appellants in this case in the United States Court of Appeals for the Ninth Circuit. The 2-1 opinion was entered on April 28, 2010. A timely Petition for Rehearing and Rehearing *En Banc* was filed in the Ninth Circuit Court of Appeal on May 12, 2010. The Petition for Rehearing was denied by a 2-1 decision of the court entered June 29, 2010. Mandate was issued on July 6, 2010. Petitioners applied for a Recall of the issuance of mandate to file this Petition for Writ of Certiorari which was denied on July 23, 2010. *See* Appendices A-D.

This petition is timely filed within 90 days of the date of the order denying rehearing. Rule 13, Rules of the U.S. Supreme Court. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
42 U.S.C. § 1983

> "Every person who, under color of statute, ordinance, regulation custom, or usage, of any State or Territory or the District of Columbia, subjects or caused to be subjected, any citizen

> of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to any party injured in an action at law, suit in equity or other proper proceeding for redress..."

Fed.Rule Civ.Proc. Rule 56(b), 28 U.S.C.

> "A Party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim"

STATEMENT OF THE CASE

The trial court below denied summary judgment to the police officers and the City on the issue of qualified immunity on both the Fourth and Fourteenth Amendment causes of action asserted by the Respondents below. In a 2-1 decision in the Ninth Circuit Court of Appeal, the court affirmed the denial.

The dissenting opinion of Justice O'Scannlain aptly states that the majority's holding in this case denying qualified immunity "would paralyze police officers' ability to make split-second judgments to protect themselves and the public and would eliminate the purpose of qualified immunity." (See Appendix A, Memorandum Opinion, Dissent, page 5)

The majority opinion ignores the precedent both of its own circuit and this court in denying the officers

qualified immunity and improperly considers force alternatives that were not available to individual officers in determining whether the use of deadly force was reasonable. The majority opinion further fails to consider the higher standard by which the officers conduct should be judged under the Fourteenth Amendment contrary to the clear authority of this court.

Santa Rosa Police Officers Travis Menke, Patricia Mann, Daniel Jones, and Jerry Ellsworth were dispatched to the DeSantis residence in response to a 911 call placed by Patricia DeSantis. She told the dispatcher that her husband was firing shots into the ceiling of their residence. Sergeants Rich Celli and Jerry Soares also responded to the residence. It is undisputed that within two minutes after arriving at the residence, three of the officers fired their weapons at Mr. DeSantis when he unexpectedly charged at the officers who were standing in the driveway of the residence. Those officers, who had not had a chance to search Mr. DeSantis, reasonably believed that he was armed based on the facts they received from dispatch. In fear for their own safety and the safety of their fellow officers, these three officers each fired one shot from their weapons after Mr. DeSantis continued to charge at them after he was already hit by a less lethal round fired from a SAGE rifle by Sgt. Soares. That less-than-lethal round did not stop Mr. DeSantis's advance.

While en route to the residence, the officers were advised that a man was firing a gun in the residence, that his wife and children were in the house and were also advised that additional shots were fired. Officer Ellsworth heard the additional shots as he arrived on scene.

The DeSantis residence was part of a duplex located at the end of a driveway. The officers positioned themselves on the opposing sides of the driveway with three officers on each side. Officers Menke and Mann were on the west side of the driveway and had their handguns drawn. Officer Ellsworth had his K-9 dog with him and was also on the west side of the driveway positioned behind Officers Menke and Mann. Sgt. Celli was on the east side of the driveway along with Sgt Soares and Officer Jones. Sgt. Celli was armed with a rifle; Sgt. Soares had a less-than-lethal impact weapon known as a "SAGE" which fired plastic projectiles. Officer Jones had a rifle.

Mr. DeSantis was outside the residence when the officers arrived. He was wearing baggy jeans and no shirt. There is no genuine dispute that Mr. DeSantis, unexpectedly, jumped up from a prone position and charged at Officers Menke and Mann in what the officers have described as "a sprinter taking off from the blocks." The incident was witnessed by Joseph Silny, a neighbor whose duplex shared the driveway with the DeSantis residence. Mr. Silny corroborates the statements of the officers as to how the incident occurred.

Although at one point Patricia DeSantis described Mr. DeSantis as "walking" towards the officers, her own testimony contradicts this statement and fails to establish a genuine issue as to this fact. She acknowledged in other parts of her testimony that Mr. DeSantis got up off the ground and started **running** towards the officers. She testified that she was unable to estimate the pace at which he was moving since

"it is all in slow motion in my mind," although she indicated at one point in her testimony that "it looked like he was running."

The officers have all testified that they believed, based upon the information provided to them by dispatch, that it was likely Mr. DeSantis was armed. Although none of the officers saw a gun in his hand, none of them had an unobstructed and complete view of his hands at all times. They believed he could have had a gun in his pocket or the back of his pants. There is no dispute that prior to the shooting, the officers did not have a chance to search Mr. DeSantis for lethal weapons. The officers also reasonably believed when he charged at them that he could also seize one of their weapons or otherwise cause them serious injury.

REASONS FOR GRANTING THE PETITION

Qualified immunity is an entitlement not to stand trial or face other burdens of litigation which is effectively lost if the case is erroneously permitted to go to trial. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). As this court has repeatedly stressed, it is important to resolve the issue of qualified immunity at the earliest possible state in litigation. *Saucier*, 533 U.S. at 201; *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Here, the Ninth Circuit has set an impossible bar for an officer to establish qualified immunity in conflict with decisions of this court and imposed liability under the Fourteenth Amendment when there was clearly no evidence in the record of "a purpose to harm" to justify a finding of liability.

As Justice O'Scannlain, the dissenting justice in this case stated, denying qualified immunity in this case "would paralyze police officers' ability to make split-second judgments to protect themselves and the public." (Dissent, page 5). It is important for this court to set forth a clear standard for judging an officer's conduct in rapidly evolving situations in which they are forced to make split-second decisions and to what extent, if any, the court should consider the availability of other force options at the scene.

I. CERTIORARI IS WARRANTED TO RESOLVE CONFLICTS BETWEEN THE NINTH CIRCUIT AND OTHER CIRCUITS AS WELL AS SUPREME COURT AUTHORITIES WITH RESPECT TO THE APPROPRIATE STANDARD TO JUDGE WHETHER AN OFFICER'S CONDUCT IS REASONABLE WHEN FACED WITH A SPLIT-SECOND DECISION

This court established the reasonableness standard in the seminal case of *Graham v. Conner,* 490 U.S. 386, 394 (1989) and stated that the 'reasonableness' of a particular use of force must be judged "from the perspective of a reasonable officer on the scene" rather than with the "20/20 vision of hindsight." The court recognized the fact that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.*, at 396.

However, in direct conflict to that recognition, the Ninth Circuit has given undue significance in evaluating

an officer's use of force to whether there were other "force alternatives" available to the officer. In the circumstances of this case, the court considered force options that were in fact not available to the individual officers who used deadly force. Although there were officers on scene who had tasers in their possession, two of the officers who fired their guns did not even have tasers on them; and the third officer who had to respond in a matter of split seconds would have had to drop her weapon, grab the taser and discharge it hoping to do so before the suspect reached her.

The uncontradicted testimony of the officers established that they feared for their own lives or the lives of other officers when the suspect, who they reasonably believed was armed, jumped up "like a sprinter leaving the blocks" and charged at the officers who had their weapons drawn. This court recognized in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) that the use of deadly force is objectively reasonable where the officer has probable cause to believe that a suspect poses a significant threat of death or serious physical injury to the officer or others. Even the Ninth Circuit has recognized that the most import single element of the factors set forth in *Graham* is whether the suspect poses an immediate threat to the safety of the officers or others. *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994).

Other circuits have recognized that the court must not second guess the conduct of officers forced to make split-second decisions when they believe their lives are at risk. The court in *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) stated:

> "Thus under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer on the scene. **We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policeman face everyday.** What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant then to someone analyzing the question at leisure."

The Fourth Circuit similarly recognized that all that is required to justify deadly force is a "sound reason to believe that the suspect poses a serious threat [to an officer's safety] or safety of others. Officers ***need not be absolutely sure,*** however, of the nature of threat or the suspect's intent to cause them harm–the constitution does not require that certitude precede the act of self-protection." *Elliot v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996).

In fact, many decisions of the Ninth Circuit, including this case, refuse to give weight to their own precedent in *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994) which stated that:

> **"the text of the Fourth Amendment indicates the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them, [citations omitted] Requiring officers to find and choose the least intrusive alternative would require them to exercise**

> **superhuman judgment.** In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. **Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.**" (*Id.*, at page 915, emphasis added)

Instead, the majority in this court's opinion relied upon *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) and stated that the availability of other force alternatives was "a factor" to be considered in analyzing the reasonableness of Petitioners' use of force. The court then inappropriately made it the determining factor in combination with an isolated section of the plaintiff's deposition taken completely out of context and with total disregard for the ***entire record*** as discussed below. Moreover, the majority considered force options which were not even available to the individual officers who used deadly force.

Justice O'Scannlain aptly stated "if this is how the police must operate to avoid trial for excessive force, I question whether the qualified immunity doctrine serves any purpose at all." (Dissent, page 6, Appendix A)

II. CERTIORARI IS WARRANTED TO ENSURE THAT THE APPROPRIATE STANDARD IS APPLIED IN FOURTEENTH AMENDMENT CASES WHERE OFFICERS ARE FORCED TO MAKE SPLIT-SECOND DECISIONS

Even more troubling is the court's finding under the circumstances of this case that the officers' conduct could constitute a "purpose to harm" sufficient to support a Fourteenth Amendment claim by the wife, child and mother of the suspect. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

There is no dispute that the incident in question evolved in a matter of minutes and the decision to fire, even less. Yet, the majority decision below failed to find that the officers were entitled to qualified immunity even under the more stringent standard required in a Fourteenth Amendment claim.

As articulated by the dissent, "not only do the DeSantises'conclusionary allegations of improper motive fall short of the mark, but the record amply supports the officers' testimony that they "did not intend to commit any harm unrelated to the legitimate use of force necessary to protect the public and themselves." Citing to *Moreland v. Las Vegas Metro. Police Dept.*, 159 F.3d 365, 373 (9th Cir. 1998).

The recent Ninth Circuit opinion in *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), contrary to the holding in this case, properly distinguished the difference in the appropriate standard to be used in analyzing a Fourteenth Amendment claim "when the

circumstances are such that actual deliberation [by the officer] is practical" or on the other hand where a law enforcement officer "makes a snap judgment because of an escalating situation." In the later case, the court held that the "purpose to harm" standard is clearly more appropriate. *Porter v. Osborn*, 546 F.3d 1131, 1140 (9th Cir. 2008)

In *Porter*, the court held that where the undisputed evidence showed that the encounter "took very little time–probably no more that five minutes" that there was not time for the officer to deliberate since the officer was required to make "split-second decisions." Here, the amount of time involved was less than half the time in *Porter*, and the officers obviously did not have the time to deliberate and form an intent to harm the suspect.

Under these circumstances, denial of qualified immunity completely undermines the fundamental nature of this protection for police officers.

III. CERTIORARI IS WARRANTED TO UPHOLD REASONABLE STANDARDS SET BY THIS COURT REGARDING SUMMARY JUDGMENT MOTIONS

This court has held that where the record on a motion for summary judgment ***taken as a whole*** could not lead a rational trier of fact to find for the non moving party, there is no genuine issue of fact for trial. *Matsushita Electrical Industrial Co v. Zenith Radio Corporation*, 475 U.S. 547 (1986).

As noted by the dissent, the majority's analysis falls into the trap which the Supreme Court warned against in *Scott v. Harris*, 550 U.S. 372, 380 (2007). In *Scott*, the court cautioned that when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury would believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Here, the majority credited and based its decision on the testimony of Patricia DeSantis that her husband "walked" as opposed to "charged" at the officers before they shot. This alleged "fact" is discredited not only by her own testimony (in which she states that everything in her mind occurred in "slow motion;" that she was unable to gauge the speed at which her husband moved towards the officers, and that he was running) but also by the testimony of seven eyewitnesses – one of which was an independent bystander.

A single, arguably ambiguous statement should not raise a triable issue of fact. *Hart v. Parks*, 450 F.3d 1059, 1068 (9th Cir. 2006).

More importantly, the appropriate standard for the court to apply in ruling on the officers' motion for summary judgment on qualified immunity is the perspective of the officer not of the wife of the suspect. *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010).

The record in this case is such that no reasonable court should have denied the officers qualified immunity.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the court grant review to resolve these important public safety issues so that police officers are "not paralyzed" in their ability to make life saving, split-second decisions.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED APRIL 28, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA DESANTIS, Guardian Ad Litem; RICHARD DESANTIS deceased, and as Guardian Ad Litem; DANI DESANTIS, a minor; TIMOTHY FARRELL, a minor; ADRIANNE DESANTIS,

Plaintiffs - Appellees,

v.

CITY OF SANTA ROSA; RICHARD CELLI; TRAVIS MENKE; PATRICIA MANN,

Defendants - Appellants.

No. *08-17536*

December 8, 2009, Argued and Submitted, San Francisco, California

April 28, 2010, Filed

JUDGES: Before: O'SCANNLAIN, RAWLINSON and BEA, Circuit Judges. O'SCANNLAIN, Circuit Judge, dissenting.

Appendix A

OPINION

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3.*

Defendants-Appellants City of Santa Rosa, *et al.* (collectively City of Santa Rosa) appeal from a district court order that denied the cross-motion for partial summary judgment filed by the City of Santa Rosa and the three police officers who shot lethal rounds at Richard DeSantis—Sergeant Richard Celli, Officer Travis Menke, and Officer Patricia Mann—in an action brought by Plaintiffs-Appellees under *42 U.S.C. § 1983* for use of excessive force.

We have jurisdiction over this interlocutory appeal to the extent that it raises purely legal questions. *See Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); see also Behrens v. Pelletier, 516 U.S. 299, 313, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996).* Review is limited to whether the defendants are entitled to qualified immunity as a matter of law. *See Lee v. Gregory, 363 F.3d 931, 932 (9th Cir. 2004).*

Reviewing the district court's denial of qualified immunity *de novo,* assuming the version of disputed issues of material facts asserted by the non-moving party, and drawing all reasonable inferences in favor of the non-moving party, *see Bryan v. McPherson, 590 F.3d 767, 772 (9th Cir. 2009),* we conclude that the district

court did not err in denying qualified immunity to the City of Santa Rosa and the individual police officers. "If a genuine issue of material fact exists that prevents a determination of qualified immunity at summary judgment, the case must proceed to trial." *Porter v. Osborn, 546 F.3d 1131, 1136 (9th Cir. 2008)* (citation omitted).

"We must balance the nature and quality of the intrusion on the individual's *Fourth Amendment* interests against the countervailing governmental interests at stake" to determine whether the City of Santa Rosa employed constitutionally excessive force. *Bryan, 590 F.3d at 772* (citations and internal quotation marks omitted). We must assume that the facts as presented by the non-movant are true and can be proven at trial. *See Johnson v. Jones, 515 U.S. 304, 319, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)*. Taken in the light most favorable to the Plaintiffs, the facts in this case raise a triable issue of fact as to whether the officers who fired lethal shots at Richard DeSantis used excessive force. Both Patricia DeSantis and the dispatcher informed the police that Richard was mentally ill. Patricia also informed the officers that Richard was unarmed and the gun was in the house. The officers could see Richard's hands at all times, and could see he was not hiding a weapon in his waistband. Richard never threatened to inflict, and did not inflict, harm to his family or to the officers. He was outnumbered six to one by police officers. When Sergeant Celli shot him, Richard was at least ten yards away from the nearest officer, and was walking towards

them with a shattered right arm. None of the officers ever warned Richard that they would shoot him if he did not stop. The six officers could have used the Sage weapon again, or their Tasers, or their batons, or the dog.[1] These facts raise a triable issue of fact as to whether the officers used excessive force against Richard when they shot and killed him. *See Deorle v. Rutherford, 272 F.3d 1272, 1282-83 (9th Cir. 2001), as amended.*

For the same reasons, the district court did not err in denying qualified immunity to the City of Santa Rosa and the individual officers on the substantive due process claim. Genuine issues of material fact remain to be resolved in determining whether the officers were motivated by a purpose to cause harm that shocks the conscience. *See id. at 1140.*

AFFIRMED.

---

1. Although officers are not required to use the least intrusive degree of force available, *Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)*, "the availability of alternative methods of capturing or subduing a suspect may be a factor to consider." *Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005)* (citation omitted).

Appendix A

DISSENT BY: O'SCANNLAIN

DISSENT

O'SCANNLAIN, Circuit Judge, dissenting:

By now, I would have thought it axiomatic that in excessive-force cases, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)*. Nevertheless, the majority would deny qualified immunity to officers forced to make a split-second decision whether to shoot a deranged man, believed to be armed, who continued to charge directly at them after a warning shot by a less-lethal weapon failed to deter his progress. Even more surprising, the majority asserts that there are triable issues as to whether the officers' conduct shocks the conscience. Because I do not think that the officers' conduct was objectively unreasonable, let alone conscience shocking, I respectfully dissent.

I

On April 9, 2007, at approximately 1:00 am, Patricia DeSantis made a frantic 911 call reporting that her mentally ill husband, Richard, was having paranoid delusions and firing a gun into the ceiling of their home. At the time, their two-year-old daughter and twelve-

year-old son were also in the home. Richard was still firing the gun as the first officers arrived at the scene. The six officers who responded stationed themselves at the end of the driveway with their weapons drawn and took cover.

Patricia was able to lead her husband outside to deal with the police. She testified in her deposition that she told police that he was having mental health issues and that the gun was in the house. At the time, Richard was wearing only a pair of baggy jeans. Although the police did not see anything in his hands or on his person, they did not have an opportunity to search him for weapons until after the incident unfolded.

At first, Richard reluctantly complied with the officers' orders to get down on the ground. However, without any warning or provocation, he got up and began charging at Officers Menke and Mann. After Richard got within 10-15 yards of them, Sergeant Soares fired a "less-lethal" Sage weapon, striking Richard in the arm with a plastic bullet. When this warning shot failed to stop the charge, Sergeant Celli fired his rifle. That shot, too, failed to stop Richard, who got within 10-15 feet of Officers Menke and Mann when both fired their service weapons.

Richard, who turned out to be unarmed, was pronounced dead at the scene. The entire episode, from the police arrival to the shooting, lasted only about sixty to ninety seconds.

Appendix A

II

A

The majority holds that there is a triable issue of fact as to whether the officers used excessive force, relying in part on Patricia's deposition testimony. In so holding, the majority appears to have fallen into the very trap against which the Supreme Court warned in *Scott v. Harris:* "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).*

The majority credits Patricia's testimony that her husband was merely "walking" toward the officers when the officers fired on him.[1] Not so, according to the seven other eyewitnesses, who testified that the round from the Sage weapon only slowed Richard "momentarily," and that he continued to *sprint* directly toward Officers Mann and Menke. **[ER 242, 344 (Celli); 380, 387-88 (Menke); 434-35 (Mann); 469, 471 (Soares); 533-35 (Jones); 1027 (Ellsworth); 1169 (Silny)].** Given these seven consistent accounts, plus Patricia's admission that "[i]t was like slow motion, so I can't even tell you how fast it all moved," her "version of events is so utterly

1 The majority also notes that Richard had a "shattered right arm." This fact is irrelevant, however, absent any evidence in the record that the officers knew he was so injured.

discredited by the record that no reasonable jury could have believed [her]." *Id. at 380.* Indeed, not even the district court gave the DeSantises the benefit of this inference when viewing the facts in the light most favorable to them. **[Dist. Ct. Order at 11.]** Consequently, I am perplexed as to why the majority insists on characterizing Richard's charge at the officers as "walking."

B

The purpose of the qualified immunity doctrine "is to recognize that holding officials liable for reasonable mistakes might unnecessarily paralyze their ability to make difficult decisions in challenging situations, thus disrupting the effective performance of their public duties." *Mueller v. Auker, 576 F.3d 979, 993 (9th Cir. 2009).* In my view, the officers who shot Richard are entitled to qualified immunity on the excessive force claim because they made a reasonable mistake as to whether he was armed. *See Saucier v. Katz, 533 U.S. 194, 205, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).*

The officers testified that they believed that Richard was still armed when he charged at Officer Menke. **[ER 234 (Celli), 380 (Menke), 416 (Mann)].** Even assuming that Patricia told the officers that her husband was not armed, and they could not see a weapon on his person, I still cannot say that their belief was unreasonable when (1) he had been firing a weapon in an occupied residence just a minute earlier, (2) he had not yet been searched for weapons, and (3) he could

have been concealing a weapon in his baggy jeans. *See Burrell v. McIlroy, 464 F.3d 853, 858 (9th Cir. 2006)* (holding that when a shooting suspect is known to keep a firearm in his apartment, police may "act on the assumption that he may be armed and dangerous" even outside the apartment).

Although "[t]he officers may not have known for certain whether [Richard] had a weapon, . . . it would have been more than foolish for them to assume he did not; and it would be singularly inappropriate for us to essentially force the police to make such a dangerous assumption." *Chew v. Gates, 27 F.3d 1432, 1465 (9th Cir. 1994)* (Trott, J., dissenting). Therefore, I simply cannot agree with the district court that the officers should have waited to act "until he reached them and was able to wrestle a gun away." **[Dist. Ct. Order at 12]** If this is how the police must operate to avoid trial for excessive force, I question whether the qualified immunity doctrine serves any purpose at all.

Because I believe that the majority's holding would paralyze police officers' ability to make split-second judgments to protect themselves and the public, I would reverse the district court's denial of qualified immunity on the excessive-force claim.

III

Finally, I cannot agree with the majority that genuine issues of material fact remain with respect to the *Fourteenth Amendment* substantive due process

claims. The district court denied the cross-motions for summary judgment not because triable issues remain, but because the parties did not address the correct legal standard in their moving papers. Upon de novo review, however, I am unable to conclude that the DeSantises have raised a triable issue with respect to whether the officers' conduct shocks the conscience.

The relevant legal standard is whether the officers "acted with a purpose to harm . . . without regard to legitimate law enforcement objectives." *Porter v. Osborn, 546 F.3d 1131, 1133 (9th Cir. 2008)*. To survive summary judgment, the DeSantises "must do more than simply allege that the defendants acted with an improper motive." *Jeffers v. Gomez, 267 F.3d 895, 907 (9th Cir. 2001)* (per curiam). Not only do the DeSantises' conclusory allegations of improper motive fall short of the mark, but the record amply supports the officers' testimony that they "did not intend to commit any harm unrelated to the legitimate use of force necessary to protect the public and themselves." *Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 373 (9th Cir. 1998)*. Therefore, I would reverse on the *Fourteenth Amendment* claim as well.

IV

For the foregoing reasons, I respectfully dissent.

APPENDIX B — ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED OCTOBER 28, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

PATRICIA DESANTIS, et al.

Plaintiffs,

v.

CITY OF SANTA ROSA, et al.,

Defendants.

No. C 07-03386 JSW
(consolidated with C 07-04474)

ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

Now before the Court is the motion for summary judgment filed plaintiffs Patricia DeSantis ("Mrs. DeSantis") and Dani DeSantis (collectively, "Moving Plaintiffs") and the cross-motion for summary judgment filed by defendants City of Santa Rosa ("the City"), Chief of Police Edwin Flint, Sergeant Richard Celli, Officer

Travis Menke and Officer Patricia Mann (collectively, "Defendants"). Plaintiff Adrianne DeSantis did not file a motion for summary judgment but did file an opposition to Defendants' motion.[1] The Court finds that this matter is appropriate for disposition without oral argument and it is hereby deemed submitted. *See* Civ. L.R. 7-1(b). Accordingly, the hearing set for October 31, 2008 is HEREBY VACATED. Having considered the parties' papers, relevant legal authority, and the record in this case, the Court hereby denies Moving Plaintiffs' motion for summary judgment and grants in part and denies in part Defendants' cross-motion for summary judgment.[2]

BACKGROUND

Mr. DeSantis' wife, Mrs. DeSantis, filed an action as a successor in interest and on her own behalf and of her minor daughter, Dani, arising out of Mr. DeSantis' death. Mr. DeSantis' mother, Adrienne DeSantis, also filed an action arising out of his death. These two cases have been consolidated.

On April 9, 2007, Mrs. DeSantis called 911 and advised the dispatcher that her husband, Mr. DeSantis, was firing shots into the ceiling of their home.

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1. The Court will refer to Dani and Adrianne DeSantis by their first names out of convenience, rather than disrespect.

2. The Court sustains Defendants' evidentiary objections with respect to Moving Plaintiffs' reference to a prior shooting incident by Sergeant Celli.

(Declaration of John Houston Scott ("Scott Decl."), Ex. A at 1.) She further advised the dispatcher that Mr. DeSantis was in a manic phase of a bipolar episode and that he was having paranoid delusions that there were people in the attic. *(Id.)* Mrs. DeSantis told the dispatcher that she was in the home with her two minor children, ages 2 and 10. *(Id.* at 4.)

Mrs. DeSantis instructed her son, Timothy Farrell, to inform the dispatcher that she had disarmed Mr. DeSantis, but she does not know if Farrell actually conveyed this information. (Declaration of Benjamin Nisenbaum ("Nisenbaum Decl."), Ex. B (Deposition of Patricia DeSantis) at 160:13-21.) Mrs. DeSantis led Mr. DeSantis outside. Mr. DeSantis was wearing only jeans and socks. He did not have on a shirt or shoes. *(Id.* at 167:25-168:3.) Mrs. DeSantis yelled to the police officers outside her home that Mr. DeSantis was having mental health issues and told them that the gun was in the house. *(Id.* at 167:4-10.)

Sergeant Richard Celli, Sergeant Jerry Soares and Santa Rosa Police Officers Travis Menke, Patricia Mann, Daniel Jones, and Jerry Ellsworth responded to the scene. The officers were advised that a man was firing a gun in a residence and that his wife and children were in the house. (Declaration of Caroline L. Fowler ("Fowler Decl."), Ex. F (Deposition of Travis Menke) at 36:4-37:5, Ex. H (Deposition of Jerry Ellsworth) at 50:13-23, Ex. G (Deposition of Patricia Mann) at 57:5-7.) Shots were fired inside the house when some of the officers were on the scene. *(Id.* at Ex. D (Deposition of Richard Celli) at 70:14-16, Ex. H (Ellsworth Depo.) at 59:24-60:4.)

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Officer Mann testified that the dispatcher informed them that Mr. DeSantis had a mental disorder. (Scott Decl., Ex. C (Deposition of Patricia Mann) at 102:13-19.) Officer Jones remembers Mrs. DeSantis yelling out that Mr. DeSantis had a mental illness and was in crisis. (Scott Decl., Ex. F (Deposition of Daniel Jones) at 36:14-24.) Although Sergeant Celli discovered by listening to the radio before arriving at the scene that Mr. DeSantis was shooting inside the residence, he did not remember whether he heard, before he fired his weapon at Mr. DeSantis, that Mr. DeSantis had a mental disorder. (Nisenbaum Decl., Ex. C (Deposition of Sergeant Celli) at 70:5-21, 106:10-108:2.) Sergeant Celli remembers discovering that Mr. DeSantis was still shooting when he was responding to the call. *(Id.* at 70:5-12.)

When Sergeant Celli arrived at the scene, he parked right behind Officer Jones. Sergeant Soares pulled in and parked right behind Sergeant Celli. (Scott Decl., Ex. B at 69:21-70:4, 73:8-14.) Sergeant Celli had a rifle and a Taser in the trunk of his car. *(Id.* at 72:9-73:3.) He chose to take his rifle out, and not the Taser, because he was aware that Mr. DeSantis was shooting in the residence. *(Id.)* Sergeant Celli met briefly with Sergeant Soares and Officer Jones by their cars. *(Id.* at 73:4-7.) Sergeant Celli estimated that the meeting lasted approximately ten seconds. *(Id.* at 77:3-11.) Sergeant Soares informed them that he had a Sage, a "less lethal" weapon that fires a 37-millimeter projectile polyurethane grommet. *(Id.* at 77:12-15, Ex. E (Deposition of Jerry Soares) at 34:3-35:2.)

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When he came to the southeast corner of the driveway to the DeSantis' home, Sergeant Celli observed Mr. DeSantis standing outside, just off the steps to his the residence, and observed Mrs. DeSantis holding a two-year old child in her arms on the steps. (Scott Decl., Ex. Bat 213:18-24, 214:11-16.) Sergeant Celli then observed Officers Menke, Mann and Elsworth walking towards the southwest corner of the driveway. *(Id.* at 79:1-5.) Although it was dark, Sergeant Celli "could see the scene, and Mr. DeSantis could see [him]." *(Id.* at 81:4-8.) Officer Jones testified that the lighting at the scene "was good." (Scott Decl., Ex. F (Deposition of Daniel Jones) at 102:1.) There was a streetlight near the driveway and there was light emanating from the DeSantis' home. (Nisenbaum Decl., Ex. C at 81:15-20.) Sergeant Celli was approximately eighteen to twenty yards from the front of the DeSantis' home. *(Id.* at 82:1-3.) Sergeant Celli, Sergeant Soares and Officer Jones were standing on the right side of the driveway and Officers Menke, Mann and Ellsworth were standing on the left side of the driveway. The two groups were standing approximately fifteen to twenty feet apart. *(Id.* at 86:1-25.) Officer Ellsworth had his K-9 dog with him. *(Id.* at 226:7-8.)

Sergeant Celli was in command of the scene. (Scott Decl., Ex. B at 87:11-15, 226:14-17.) Sergeant Celli advised Sergeant Soares that he would take care of tactics while Sergeant Soares would take care of communication. *(Id.* at 226:23-227:1.) Sergeant Celli ordered Officer Menke to start speaking to with Mr. DeSantis because Officer Menke had a better view of Mr. DeSantis and the scene. *(Id.* at 87:21-88:13.)

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Mr. DeSantis was wearing loose fitting jeans, but he was not wearing any shirt or shoes. *(Id.* at 83:1-22.) Sergeant Celli could see Mr. DeSantis' hands and observed that he was not holding anything. *(Id.* at 83:23-84:2.) There were no weapons sticking out of the top of Mr. DeSantis' waistband. *(Id.* at 217:10-13.) Mr. DeSantis took three or four steps away from the front of the house and toward Officer Menke. Officer Menke ordered Mr. DeSantis to put his knees to the ground. *(Id.* at 118:4-16.) Mr. DeSantis complied and eventually placed both of his knees on the ground. *(Id.* at 119:2-9.) This took "several seconds." *(Id.* at 119:8-11.) When Officer Menke was giving commands to Mr. DeSantis, the other officers had their guns pointed towards Mr. DeSantis. *(Id.*, Ex. F (Jones Depo.) at 36:16-18.) Officer Menke told Mr. DeSantis to keep his hands in the air and then to put his hands on the ground in front of him. Mr. DeSantis complied after repeated commands. *(Id.*, Ex. B at 119:23-120:3.)

Sergeant Celli had authority to order Officer Ellsworth to release the canine upon Mr. DeSantis, but he did not do so at this point because Mr. DeSantis had been complying, albeit reluctantly. *(Id.* at 102:23-103:9, 122:4-9.) Sergeant Celli did not consider the Taser to be a viable option at that point either because Mr. DeSantis was too far away at approximately 16 to 18 yards. *(Id.* at 123:4-15.) In response to an order to lay down on the ground, Mr. DeSantis then bent forward, rolled his hips to the ground, but then immediately came back up to a kneeling position. *(Id.* at 124:2-5.) Sergeant Celli still did not believe it would have been appropriate

to use the canine on Mr. DeSantis at this point. *(Id.* at 125:18-20.)

Mr. DeSantis then looked towards Sergeant Celli, looked towards his wife, looked at Officer Menke, and then ran. *(Id.* at 125:24-126:3.) Officer Celli testified that Mr. DeSantis "took off like he left the sprinter blocks." *(Id.* at 126:18-20.) However, Mrs. DeSantis testified that when Mr. DeSantis initially got up, he starting walking towards the officers. (Nisenbaum Decl., Ex. B (DeSantis Depo.) at 171:12-21, 172:5-11.) None of the officers at the scene reported seeing anything in Mr. DeSantis' hands. (Scott Decl., Ex. B (Celli Depo.) at 128:3-12, Ex. C (Mann Depo.) at 87:8-9, Ex. D (Menke Depo.) at 63:17-64:6, Ex. E (Soares Depo.) at 123:11-18, Ex. F (Jones Depo.) at 38:19-20.) Sergeant Soares fired the less lethal Sage weapon at Mr. DeSantis after he ran approximately seven to ten yards. *(Id.,* Ex. B at 128:14-16, 130:6-8.) When Sergeant Soares shot Mr. DeSantis with the Sage, Mr. DeSantis was approximately ten to twelve yards from Sergeant Soares and ten to fifteen yards from Officer Menke. *(Id.* at 129:14-23.) Mr. DeSantis was a little closer to Sergeant Soares than to Officer Menke. *(Id.* at 130:1-5.)

Mr. DeSantis tilted his body to the right briefly when he was hit with the Sage weapon, and then continued running towards Officers Menke and Mann. *(Id.* at 133:17-23.) Mr. DeSantis took another two to four steps, moving three to four yards. When Sergeant Celli estimated that Mr. DeSantis was now six to eight yards away from Officer Menke, he shot Mr. DeSantis. *(Id.* at

135:24-136:11.) Sergeant Celli could still see that Mr. DeSantis had nothing in his hands. *(Id.* at 135:13-14.) Sergeant Celli was concerned that Mr. DeSantis would kill Officers Menke and Mann by either pulling out a weapon or taking one of theirs. *(Id.* at 135:18-21.) After he was shot, Mr. DeSantis took another step or two. Two more shots were fired at Mr. DeSantis, one by Officer Menke and one by Officer Mann. *(Id.* at 137:1-17; Nisenbaum Decl., Ex. D (Menke Depo.) at 61:7-10, Ex. E (Mann Depo.) at 98:9-16.) About one and a half minutes passed between when Sergeant Celli first saw Mr. DeSantis and when he shot him. (Scott Decl., Ex. B (Celli Depo.) at 216:5-8.) Mr. DeSantis died on the scene.

During the incident, Sergeant Celli had a batton on him. There were at least two other officers with a Taser and Officer Ellsworth had a police canine with him. *(Id.* at 225:23-226:8.)

Under the critical incident protocol adopted by the police chiefs in Sonoma County, whenever there is an officer involved shooting, an investigation is conducted by an outside police agency. Here, the investigation of the shooting of Mr. DeSantis was conducted by the Sonoma County Sheriff's Office, with assistance by officers from the Petaluma Police Department. (Fowler Decl., ¶ 2, Ex. B at 1.). The completed investigation was forwarded to the Sonoma County District Attorney for review. The District Attorney concluded that the officers were not criminally liable. *(Id.*, ¶4, Ex. B at 18.)

Mrs. DeSantis is bringing claims under 42 U.S.C. § 1983 ("Section 1983") on behalf of herself and her

daughter, Dani, against the City and against Sergeant Celli, Officer Menke, and Officer Mann (collectively "Defendant Officers") for excessive force, deliberate indifference to the need to summon or provide emergency medical care for Mr. DeSantis, and deprivation of familial relationship. Moving Plaintiffs also bring a wrongful death claim under California Code of Civil Procedure section 377.60. Adrienne brings a loss of familial relationship claim under Section 1983 against the Defendant Officers and brings a Section 1983 claim against the City and Chief Flint in his official capacity.

Moving Plaintiffs move for summary judgment on their claims against Sergeant Celli. Defendants cross move for summary judgment on all of the claims filed by Moving Plaintiffs and Adrienne.

ANALYSIS

A. Legal Standard on Summary Judgment.

A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A party moving for summary judgment who does not have the ultimate burden of persuasion at trial, must

produce evidence which either negates an essential element of the nonmoving party's claims or show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). A party who moves for summary judgment who does bear the burden of proof at trial, must produce evidence that would entitle him or her to a directed verdict if the evidence went uncontroverted at trial. *C.A.R. Transp. Brokerage Co., Inc. v. Darden*, 213 F.3d 474, 480 (9th Cir. 2000).

Once the moving party meets his or her initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In order to make this showing, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). It is not the Court's task to "scour the record in search of a genuine issue of triable fact." *Id.* (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 US. at 323.

An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 US. 242, 248-49 (1986). A fact is "material" if it may affect

the outcome of the case. *Id.* at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the nonmoving party." *Freeman v. Arpaio*, 125 F.3d 723, 735 (9th Cir. 1997).

B. Legal Standards Applicable to Qualified Immunity.

In support of their motion, Defendants argue that they are entitled to qualified immunity on Moving Plaintiffs and Adrienne's claims. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 US. 511, 526 (1985). The privilege is an immunity from suit rather than a mere defense to liability. *Id.* As a result, the Supreme Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Saucier v. Katz*, 533 US. 194, 201 (2001) (citing *Hunter v. Bryant*, 502 US. 224, 227 (199)).

In *Saucier*, the Supreme Court stated that a court called upon to rule on the issue of qualified immunity must ask the following threshold question:"Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *See Id.* (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* However, if the Court finds that

the facts would show the violation of a constitutional right, the next inquiry is to determine "whether the right was clearly established." *Id.*

A constitutional right is clearly established for qualified immunity purposes if "[t]he contours of the right [are] sufficiently clear that [at the time the alleged unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *Id.* at 202 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ... ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. "In other words, an officer who makes a reasonable mistake as to what the law requires under a given set of circumstances is entitled to the immunity defense." *Boyd v. Benton Co.*, 374 F.3d 773, 781 (9th Cir. 2004) (citing *Saucier*, 533 U.S. at 205). Thus, a court "must determine whether the law governing the official's conduct was clearly established at the tune the challenged conduct occurred." *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994) (citing *Hallstrom v. Garden City*, 991 F.2d 1473, 1482 (9th Cir. 1993)). A court should then address the question "whether, under that clearly established law, a reasonable officer could have believed the conduct was lawful." *Id.*

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C. Mrs. DeSantis' Claims Against the Defendant Police Officers.

Mrs. DeSantis, as Mr. DeSantis' successor in interest, brings a claim for excessive force under the Fourth Amendment against the Defendant Officers. Mrs. DeSantis moves for summary judgment on her claim against Sergeant Celli and Defendants cross move for summary judgment against her claims against all Defendant Officers.

The Fourth Amendment proscribes "unreasonable searches and seizures." U.S. Const. amend IV.; *see also Allen v. City of Portland*, 73 F.3d 232, 235 (9th Cir. 1995); *Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994). The ultimate test of reasonableness requires the court to balance the governmental interest that justifies the intrusion and the level of intrusion into the privacy of the individual. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1496 (9th Cir. 1996).

Mrs. DeSantis must show that the Defendant Officers' use of force was unreasonable. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). The reasonableness of the particular use of force must be judged from the perspective of a reasonable officer on the scene. *Graham*, 490 U.S. at 396. The reasonableness inquiry is objective, however, asking "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. When determining whether the amount of force used was reasonable, the Court must balance "the nature and quality of the intrusion on the individual's Fourth

Amendment interests against the countervailing governmental interests at stake." *Johnson v. County of Los Angeles*, 340 F.3d 787, 792 (9th Cir . 2003) (citing *Graham*, 490 U.S. at 396). The Court must consider whether the "'totality of the circumstances' justifies the force used, examining particularly severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396, quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). Further, "where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining ... the reasonableness of the force employed." *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001).[3] Although officers "are not required

3. As the Court in *Deorle* explained: The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. ... Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual.

Id. at 1282-83 (internal citations omitted)

to use the least intrusive degree of force possible, " *see Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994), in some cases, "the availability of alternative methods of capturing or subduing a suspect may be a factor to consider." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005). Finally, the reasonableness of the particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham*, 490 U.S. at 396 (citing *Terry v. Ohio*, 392 U.S. at 20-22).

Upon reviewing the record in this case, the Court concludes that it cannot grant summary judgment for either party on this issue. On Moving Plaintiff s motion regarding their claim against Sergeant Celli, considering the evidence and all reasonable inferences in the light most favorable to Defendants, the officers were aware that just before and up to their arrival, Mr. DeSantis was shooting a gun in the home in which his wife and two young children were inside. Although they could not see a gun in his hands, they did not know whether he had a gun in his pants. Sergeant Celli does not remember hearing that Mr. DeSantis was bipolar or mentally unstable before he shot him. Sergeant Celli observed Mr. DeSantis sprinting towards officers who had their weapons drawn. The Sage weapon did not successfully stop Mr. DeSantis from running at the officers. These facts were developing quickly. Less than two minutes passed from when Sergeant Celli first saw Mr. DeSantis and when he shot him. Based on these facts, a reasonable juror could find that Mr. DeSantis posed an immediate threat to the safety of the officers, and thus, the amount of force used was reasonable.

On the other hand, viewing the evidence and all reasonable inferences in the light most favorable to Moving Plaintiffs, a reasonable juror could find that the amount of force used was unreasonable. Mrs. DeSantis informed the dispatcher and the officers on the scene that Mr. DeSantis did not have the gun anymore. By shooting up into the empty attic, Mr. DeSantis did not inflict, or threaten to inflict, serious physical harm. Mr. DeSantis never threatened his family members or any of the officers with the gun. Mr. DeSantis was bipolar and was in mental crisis. Mr. DeSantis was outnumbered by the officers on the scene by six to one. The officers were all armed, at least two officers had Tasers, one officer had a Sage, and another officer had his K-9 dog with him. Although Sergeant Celli initially did not order the dog or the Tasers to be used because Mr. DeSantis had been compliant and was too far away for the Taser, those circumstances changed when Mr. DeSantis started running towards the officers. When Sergeant Celli shot Mr. DeSantis, he was still six to nine yards away from Officers Menke and Mann. Mr. DeSantis' hands were visible and he did not have a weapon in them. There is no evidence that any of the officers warned Mr. DeSantis that he would be shot if he kept running towards the officers. Based on the totality of the circumstances, the Court finds that a reasonable juror could easily find that the use of deadly force against Mr. DeSantis was not reasonable.

Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002), a case Defendants argue is analagous, is easily distinguished. At the time of the shooting in that case,

the defendant detective was the only officer on the scene. The suspect started to hit the detective and then grabbed the detective by his throat. The detective tried to back away, but the suspect came after him, yelling "Shoot me, motherfucker." The detective tried to fight the suspect off by hitting him with a flashlight. The suspect started kicking the detective in the stomach and groin. Although the detective tried to back away and fend off the blows and kicks, the suspect charged him, held him in a bear hug and grabbed the detective's gun by the barrel. As he was warding off blows to his head, the detective fought for control of his gun. During the struggle for the gun, the detective fired and killed the suspect. *Id.* at 1181. This case does not stand for the proposition that a man with no gun in his hand when he is almost twenty feet away from six armed officers poses an immediate threat to the officers' safety.

Nor can the Court determine as a matter of law that the officers are or are not entitled to qualified immunity. As the Court explained in *Deorle* in denying qualified immunity:

> Every police officer should know that it is objectively unreasonable to shoot-even with lead shot wrapped in a cloth case-an unarmed man who:has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals.

Id., at 1285. Again, viewing the facts in the light most favorable to Moving Plaintiffs, Mr. DeSantis had not threatened any of his family members or any of the officers with the gun, he was mentally disturbed, he was not given any warning of the imminent use of force, let alone deadly force, and he did not present an objectively reasonable immediate threat of death or of serious injury to the officers at the time of the shooting. Moreover, the Court finds it significant that several alternative methods of capturing or subduing Mr. DeSantis were available. As Mr. DeSantis came closer, the Tasers could have been used. Moreover, the canine could have been used to stop him. With no weapon, Mr. DeSantis did not pose a serious threat of killing one of the officers until he reached them and was able to wrestle a gun away. Yet, Mr. DeSantis was shot when he was still almost twenty feet away from the closest officer. In light of such circumstances, under clearly established law, a reasonable officer could not have believed that using deadly force against Mr. DeSantis was lawful.

On the other hand, viewing the facts in the light most favorable to Defendants, the Court cannot find as a matter of law that, under clearly established law, a reasonable officer could not have believed that using deadly force against Mr. DeSantis was lawful. Accordingly, the Court denies Moving Plaintiffs' and Defendants' motion for summary judgment as to Mrs. DeSantis' claims against the Defendant Officers.

D. Plaintiffs' Claims Against Defendant Officers under Fourteenth Amendment.

Dani and Adrienne cannot bring the Fourth Amendment claim that Mr. DeSantis could have brought had he survived. Instead, as the daughter and mother of the deceased, their claims are limited to ones for loss of familial relationship with Mr. DeSantis under the Fourteenth Amendment. *See Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365, 371 (9th Cir. 1998). Parents and children of a person killed by law enforcement officers may bring this substantive due process claim. *Id.* To prevail on such a claim, Plaintiffs must demonstrate that the officers' use of force "can properly be characterized as arbitrary, or conscious shocking, in a constitutional sense." *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1988). To meet this standard, Plaintiffs must show that the officers were motivated by a *purpose to cause harm* that was unrelated to the legitimate object of their use of force. *Id.* at 372 (emphasis added); *see also Porter v. Osborn,* — F.3d —, 2008 WL 4614334, *5 (9th Cir. 2008). Neither Moving Plaintiffs nor Defendants addressed whether the claims by Dani and/or Adrienne meet this stricter standard in their motions. Accordingly, the Court denies both motions to the extent they seek summary judgment on the claims by Dani and/or Adrienne against the Defendant Officers.

E. Claims Against Chief Flint and the City.

Defendants move for summary judgment on the claims against Chief Flint and the City. "Under Section 1983, supervisory officials are not liable for actions of

subordinates on any theory of vicarious liability." *Hanson v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986)). "A supervisor may be liable if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Id.* (citing *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987). Where there is no overt participation in the allegedly wrongful act, supervisory liability can be established when the supervising officials implement "a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'" *Id.* (quoting *Thompkins*, 828 F.2d at 304); *cf. Munger v. City of Glasgow*, 227 F.3d 1082, 1087 (9th Cir. 2000) ("The 'inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.'") (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

With respect to the City, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). Thus, to establish that the City is liable, Plaintiffs must show that:(1) they had a constitutional right of which they were deprived; (2) the City had a custom created by those who may be fairly said to determine official policy, which amounted to, at a minimum, deliberate indifference to

Plaintiffs' constitutional rights; and (3) the custom was the moving force behind the constitutional violation. *See Blair v. City of Pomona*, 223 F.3d 1074, 1079 (9th Cir. 2000); *see also Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992).

Moving Plaintiffs argue that they are pursuing the following three alternative theories of municipal liability: (1) that the use of deadly force against Mr. DeSantis was ratified by the City's final decision maker, Chief Flint; (2) that the City failed to adequately train officers in responding to 5150 situations; and (3) that the City maintains a *defacto* policy of failing to discipline officers for use of excessive force that authorized, encouraged and condoned the use of excessive force by police officers. Adrienne argues that liability against the City under *Monell* is warranted based on the City's failures in its post-shooting investigative procedures.

1. Claim of Chief Flint's Ratification.

Ratification may form the basis for holding a municipality liable under *Monell* "[i]f the authorized policymakers approve a subordinate's decision and the basis for it...." *Haugen v. Brosseau*, 339 F.3d 857, 875 (9th Cir. 2003) (quoting *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)). However, a plaintiff must still "prove [] the existence of an unconstitutional policy." *Id.* (quoting *Praprotnik*, 485 U.S. at 128). While a single decision *may* be sufficient to trigger Section 1983 liability, "the plaintiff must show that the triggering decision was the product of a 'conscious, affirmative choice' to ratify the

conduct in question." *Id.* (citing *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1993)). While a single, post-event ratification may provide the basis to hold a city liable under *Monell*, generally, the Ninth Circuit has done so only when there were very clear instances of abuse and gross recklessness. *See Siwiec v. Thompson L*, 2004 WL 2480516, *22 (D. Or. Nov. 3, 2004) (summarizing Ninth Circuit law on this point); *see also Estate of Escobedo v. City of Redwood City*, 2005 WL 226158, *11 (N.D. Cal. Jan. 28, 2005) ("the Ninth Circuit ... appears to require more than a failure to reprimand to establish a municipal policy or ratification of unconstitutional conduct."); *Kane v. Hodson*, 294 F. Supp. 2d 1179, 1189 (D. Haw. 2003) (same).

The Ninth Circuit's analysis in *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), and *Haugen* illustrate the considerations courts must take into account to find a municipal liable for a failure to reprimand after an investigation. In *Larez*, an expert testified as to the multiple deficiencies and improprieties regarding the police department's procedures and investigation. For example, the unit being investigated, as opposed to a separate internal affairs unit, was given responsibility for passing upon the citizen's complaint. *Larez*, 946 F.2d at 647. In addition, the expert concluded that the investigation contained holes and in consistencies "that should have been visible to any reasonable police administrator, " including improperly relying on testimony from a sergeant who was not even present during some of the relevant incidents to corroborate the defendant officers' claims. *Id.* Moreover,

the expert testified that based on his review of the incidents, he would have disciplined the officers involved and taken steps to prevent such violations in the future. *Id.* at 636. The conclusion that the department had a policy of not reprimanding officers for use of excessive force was further corroborated by a two-year study conducted by the expert which demonstrated that it was "almost impossible for a police officer to suffer discipline as a result of a complaint lodged by a citizen" and that it was as if "something had to be done on film for the department to buy the citizen's story." *Id.* at 647. In addition, a defendant officer told the plaintiff "I could blow your fucking head off right here and nobody can prove you did not try to do something, " while he was pointing a gun in the plaintiff's face. In this context, the court held the city was liable under Section 1983 for failing to discipline the defendant officers. *Id.* at 647-48.

On the other side of the spectrum, the Ninth Circuit granted summary judgment against the plaintiff in *Haugen*, because there were no facts indicating that the single failure to discipline the officer rose to the level of a "ratification." *Haugen*, 339 F.3d at 875 (citing with approval *Santiago v. Fenton*, 891 F.2d 373, 382 (1st Cir. 1989) (holding that a failure to discipline in two instances did not demonstrate a sufficiently widespread municipal policy to hold the city liable under *Monell*)). Thus, the court held that the plaintiff failed to demonstrate the decision not discipline the officer was a conscious, affirmative choice to ratify the alleged use of excessive force. *Id.*

Here, Moving Plaintiffs argue and submit supporting evidence that Chief Flint reviewed the report regarding the shooting of Mr. DeSantis. (Declaration of John Houston Scott in Support of Plaintiffs' Reply ("Reply Scott Decl."), Ex. G (Deposition of Chief Edward Flint) at 51:1-23.) However, Moving Plaintiffs failed to submit any evidence indicating whether Chief Flint approved of the use of deadly force against Mr. DeSantis. Moreover, in contrast to the expert in *Larez*, who concluded that based on what he reviewed he would have disciplined all the officers involved and taken preventative steps for the future, Moving Plaintiffs have not submitted any expert evidence on how the report on the incident should have been viewed. Accordingly, the Court finds that Moving Plaintiffs failed to establish a question of fact regarding whether Chief Flint made a conscious, affirmative choice to ratify the conduct in question and the basis for it. Therefore, the Court grants Defendants' motion for summary judgment as to Moving Plaintiffs' ratification theory.

2. Claim that City Failed to Adequately Train Officers on 5150 Situations.

A policy is a "deliberate choice to follow a course of action ... made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002) (quoting *Oviatt*, 954 F.2d at 1477). A policy can be one of action or inaction. *Id.* (citing *City of Canton*, 489 U.S. at 384

(failure to train)). The "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388.

To constitute "deliberate indifference" and enter the realm of a constitutional violation, any failure to supervise must rise to a level higher than that of negligence. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (holding that "liability for a negligently inflicted harm [by state officials] is categorically beneath the threshold of constitutional due process"). A constitutional violation may be present when the need for additional or different action "is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, ... [that] the policymakers ... can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. Whether a local government entity has manifested a policy of deliberate indifference is generally a question for the jury. *Oviatt*, 954 F.2d at 1478.

In support of this claim, Moving Plaintiffs point to the testimony by Chief Flint that he was unfamiliar with any specifics relating to training received by his officers in relation to 5150 situations involving mentally ill suspects. Upon review of his testimony, the Court finds that this evidence does not support Plaintiff's claim. Chief Flint testified that officers received training in performing "5150's" when he was the Chief. (Reply Scott Decl., Ex. G at 84:15-24.) The fact that he did not have

specifics on what the training entailed does not mean that the officers were not provided training.

Moving Plaintiffs also cite to the testimony by Sergeant Clay Van Artsdalen, the person most knowledgeable from the City. Moving Plaintiff argue that Sergant Artsdalen testified that when he was in charge of training for the police department, there was no specific training for 5150 situations. What Sergeant Artsdalen actually said was:

> Q:All right. When you were the Training Manager, was any training given to Santa Rosa Police Officers regarding 5150, or 5150-type situations?
>
> A:Yes, but not using the term "5150."
>
> We did the Tactical Communication Training, which is required by P.O.S.T., and we also had training with — dealing with emotionally disturbed people, or EDP training.
>
> Q:Was that given annually, to your knowledge?
>
> A:It was in conjunction with the Tactical Communications that was held every other year.

(Reply Scott Decl., Ex. H (Deposition of Sergeant Clay Van Artsdalen) at 48:18-49:4.)[4] Again, the testimony does not support Moving Plaintiff's claim regarding the alleged lack of training. Finally, Moving Plaintiffs submit the opinion by its expert, Ron Martinelli, Ph.D., that "the City of Santa Rosa and its police department failed to provide update training to their police officers beyond the academy level in several key police practices relating to this incident." *(Id.,* Ex. A (Rebuttal Report by Plaintiff's Police Practices Expert Ron Martinelli, Ph.D.) at p. 24.) Dr. Martinelli does not explain what facts led him to this conclusion, nor does he explain what training he believes the City should have, but failed, to provide. The court finds that Dr. Martinelli's bare opinion that the City provided some, but not enough, training, would be insufficient to support of jury finding of "deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton,* 489 U.S. at 388. Accordingly, the Court grants Defendants' motion for summary judgment as to Moving Plaintiff's theory of inadequate training.

3. Claim of *Defacto* Policy of Failing to Discipline Officers.

Finally, Moving Plaintiffs contend that the City maintains a *defacto* policy of failing to discipline officers for use of excessive force that authorized, encouraged and condoned the use of excessive force by police

4. Moving Plaintiffs also cite to Sergeant Artsdalen's deposition at pages 135 through 137, but they did not file these pages of his deposition.

officers. In support of this theory, Moving Plaintiffs submit the testimony of Chief Flint in which he states that under his Department rules and policy, an officer can be found to have violated the policy against use of excessive force only if there is proof beyond a reasonable doubt. (Reply Scott Decl, Ex. G (Chief Flint Depo.) at 113:7-17.) Moving Plaintiffs also submit the following opinion by their expert, Dr. Martinelli:

> It is also my belief that the police department administration used an incorrect standard in determining whether they investigate officers in their department for possible violations of the law and department policies and procedures.
>
> The department's Chief of Police acknowledges that the decision as to whether they should investigate use of force/deadly force incidents and possible violations of law appears to rest upon whether the involved officer(s) use of force were criminal "beyond a reasonable doubt". This policy, standard and/or informal practice appears to be inconsistent with the Internal Affairs investigations training approved by the Commission on Peace Officer Standards & Training (CA-POST).
>
> No law enforcement agency that I am aware of uses the legal/criminal standard of "beyond a reasonable doubt" to determine whether an

> officer violated department policy. Classically, the law enforcement industry standard for determining out of policy violations and to pursue disciplinary action against an officer suspected of violating department policy is the "preponderance of evidence". The agency's policy or practice in this regard has the effect of encouraging and condoning officers who use excessive force, including deadly force.

(*Id.*, Ex. A at pp. 24-25.) The Court finds that this evidence is sufficient to create a question of fact precluding summary judgment on this theory. Accordingly, the Court denies Defendants' motion for summary judgment as to the Moving Plaintiffs' theory that the City maintains a *defacto* policy of failing to discipline officers for use of excessive force that authorized, encouraged and condoned the use of excessive force by police officers.

4. Claim of City's Failures in Its Post-Investigative Procedures.

Adrienne argues that liability against the City under *Monell* is warranted based on the officers' decision to use deadly force against Mr. DeSantis and the City's failures in its post-shooting investigative procedures. Adrienne focuses on the events that happened in this case, both the initial shooting and whether the shooting was properly investigated. Because, as here, Chief Flint did not overtly participate in the use of deadly force against Mr. DeSantis, liability based on his post-incident

conduct can only be established by demonstrating the existence of a policy "so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'" *Hanson*, 885 F.2d at 646. Adrienne submits a report from her expert, Lou Reitter, who states that "it appears as though the Santa Rosa Police Department does not conduct any formal administrative review of critical incidents such as this fatal police shooting" and that no "critical incident review was conducted" of the shooting of Mr. DeSantis. (Nisenbaum Decl., Ex. A (Preliminary Expert Report of Lou Reiter) at ¶¶34, 37.) Mr. Reitter opines that this "agency and supervisory failure would indicate to all officers that their conduct was appropriate and if confronted with a similar incident in the future is *[sic]* would be appropriate to perform in the exact same manner." *(Id.* at ¶37.) It is not clear whether Adrienne and her expert, Mr. Reitter, are arguing that the City's failure to sufficiently investigate the subject incident here establishes a policy or that the City has a general policy of failing to sufficiently investigate. To the extent Adrienne is arguing there is a policy or custom of failing to sufficiently investigate, beyond the alleged failures relating to the incident with Mr. DeSantis, she fails to submit evidence to establish such a policy exists. With respect to the investigation of the use of deadly force against Mr. DeSantis, it is undisputed that an investigation of the incident was conducted by the Santa Rosa Sheriff's Department. Mr. Reitter fails to address the investigation that was conducted or explain how the investigation was insufficient. Accordingly, the Court finds that Adrienne fails to demonstrate the existence

of a material question of fact which would preclude summary judgment against her *Monell* claim. Therefore, the Court grants Defendants' motion for summary judgment as to Adrienne's Section 1983 claims against Chief Flint and the City.

CONCLUSION

For the foregoing reasons, the Court DENIES Moving Plaintiffs' motion for partial summary judgment and GRANTS IN PART and DENIES IN PART Defendants' cross-motion for summary judgment as follows:

(1) The Court DENIES Defendants' motion as to the claims against the Defendant Officers and Moving Plaintiffs' claim against the City's *defacto* policy of failing to discipline officers; and

(2) The Court GRANTS Defendants' motion as to Moving Plaintiffs' claim against the City based on ratification and the alleged failure to adequately train officers regarding 5150 situations and as to Adrienne's claims against the City and Chief Flint.

IT IS SO ORDERED.

Dated:October 28, 2008

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 29, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA DESANTIS, Guardian Ad Litem; RICHARD DESANTIS, deceased, and as Guardian Ad Litem; DANI DESANTIS, a minor; TIMOTHY FARRELL, a minor; ADRIANNE DESANTIS,

Plaintiffs - Appellees,

v.

CITY OF SANTA ROSA; RICHARD CELLI; TRAVIS MENKE; PATRICIA MANN,

Defendants - Appellants.

No. 08-17536

D.C. No. 3:07-cv-03386-JSW
Northern District of California,
San Francisco

ORDER

Before: O'SCANNLAIN, RAWLINSON and BEA, Circuit Judges.

Appendix C

A majority of the panel has voted to deny the Petition for Panel Rehearing. Judges Rawlinson and Bea voted to deny the Petition for Rehearing En Banc. Judge O'Scannlain voted to grant both the Petition for Panel Rehearing and the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Appellants' Petition for Panel Rehearing and Rehearing En Banc filed on May 12, 2010, is DENIED.

No. 10-434

Supreme Court, U.S.
FILED
DEC 29 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF SANTA ROSA; RICHARD CELLI, Police Officer; TRAVIS MENKE, Police Officer; and PATRICIA MANN, Police Officer of the Santa Rosa Police Department,

Petitioners,

v.

PATRICIA DESANTIS, Guardian Ad Litem; RICHARD DESANTIS, deceased, and as Guardian Ad Litem; DANI DESANTIS, a minor; TIMOTHY FARRELL, a minor; ADRIANNE DESANTIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can qualified immunity be decided as a matter of law where genuine issues of fact are in dispute regarding whether an officer reasonably believes a suspect is armed and poses an imminent threat of great bodily injury?

2. If a trier of fact finds that petitioners did not reasonably believe decedent was armed, are petitioners entitled to qualified immunity as a matter of law if he was wounded and running toward them?

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STATEMENT OF THE CASE

Factual Background

In a fact-specific analysis the district court denied cross-motions for summary adjudication of the Fourth Amendment claims. The district court summarized the facts as follows:

On April 9, 2007, Patricia DeSantis called 911 and advised the dispatcher that her husband, Richard DeSantis, was firing shots into the ceiling of their home. She further advised the dispatcher that Mr. DeSantis was in a manic phase of a bipolar episode and that he was having paranoid delusions that there were people in the attic. Mrs. DeSantis told the dispatcher that she was in the home with her two minor children, ages 2 and 10.

Mrs. DeSantis instructed her son, Timothy Farrell, to inform the dispatcher that she had disarmed Mr. DeSantis, but she does not know if Farrell actually conveyed this information. Mrs. DeSantis led Mr. DeSantis outside. Mr. DeSantis was wearing only jeans and socks. He did not have on a shirt or shoes. Mrs. DeSantis yelled to the police officers outside her home that Mr. DeSantis was having mental health issues and told them that the gun was in the house.

Sergeant Richard Celli, Sergeant Jerry Soares and Santa Rosa Police Officers Travis Menke, Patricia Mann, Daniel Jones, and Jerry Ellsworth responded to the scene. The officers were advised that a man was firing a gun in a residence and that his wife and

children were in the house. Officer Mann testified that the dispatcher informed them that Mr. DeSantis had a mental disorder. Officer Jones remembers Mrs. DeSantis yelling out that Mr. DeSantis had a mental illness and was in crisis.

When Sergeant Celli arrived at the scene, he parked right behind Officer Jones. Sergeant Soares pulled in and parked right behind Sergeant Celli. Sergeant Celli had a rifle and a Taser in the trunk of his car. He chose to take his rifle out, and not the Taser, because he was aware that Mr. DeSantis was shooting in the residence. Sergeant Celli met briefly with Sergeant Soares and Officer Jones by their cars. Sergeant Celli estimated that the meeting lasted approximately ten seconds. Sergeant Soares informed them that he had a Sage, a "less lethal" weapon that fires a 37-millimeter projectile polyurethane grommet.

When he came to the southeast corner of the driveway to the DeSantis' home, Sergeant Celli observed Mr. DeSantis standing outside, just off the steps to his residence, and observed Mrs. DeSantis holding a two-year old child in her arms on the steps. Sergeant Celli then observed Officers Menke, Mann and Elsworth walking towards the southwest corner of the driveway. Although it was dark, Sergeant Celli "could see the scene, and Mr. DeSantis could see [him]." Officer Jones testified that the lighting at the scene "was good." There was a streetlight near the driveway and there was light emanating from the DeSantis' home. Sergeant Celli was approximately eighteen to twenty yards from the front of the

DeSantis' home. Sergeant Celli, Sergeant Soares and Officer Jones were standing on the right side of the driveway and Officers Menke, Mann and Ellsworth were standing on the left side of the driveway. The two groups were standing approximately fifteen to twenty feet apart. Officer Ellsworth had his K-9 dog with him.

Mr. DeSantis was wearing loose fitting jeans, but he was not wearing any shirt or shoes. Sergeant Celli could see Mr. DeSantis' hands and observed that he was not holding anything. There were no weapons sticking out of the top of Mr. DeSantis' waistband. Mr. DeSantis took three or four steps away from the front of the house and toward Officer Menke. Officer Menke ordered Mr. DeSantis to put his knees to the ground. Mr. DeSantis complied and eventually placed both of his knees on the ground. This took "several seconds." When Officer Menke was giving commands to Mr. DeSantis, the other officers had their guns pointed towards Mr. DeSantis. Officer Menke told Mr. DeSantis to keep his hands in the air and then to put his hands on the ground in front of him. Mr. DeSantis complied after repeated commands.

Sergeant Celli had authority to order Officer Ellsworth to release the canine upon Mr. DeSantis, but he did not do so at this point because Mr. DeSantis had been complying, albeit reluctantly. Sergeant Celli did not consider the Taser to be a viable option at that point either because Mr. DeSantis was too far away at approximately 16 to 18 yards. In response to an order to lay down on the

ground, Mr. DeSantis then bent forward, rolled his hips to the ground, but then immediately came back up to a kneeling position. Sergeant Celli still did not believe it would have been appropriate to use the canine on Mr. DeSantis at this point.

Mr. DeSantis then looked towards Sergeant Celli, looked towards his wife, looked at Officer Menke, and then ran. Officer Celli testified that Mr. DeSantis "took off like he left the sprinter blocks." However, Mrs. DeSantis testified that when Mr. DeSantis initially got up, he started walking towards the officers. **None of the officers at the scene reported seeing anything in Mr. DeSantis' hands.** Sergeant Soares fired the less lethal Sage weapon at Mr. DeSantis after he ran approximately seven to ten yards. When Sergeant Soares shot Mr. DeSantis with the Sage, Mr. DeSantis was approximately ten to twelve yards from Sergeant Soares and ten to fifteen yards from Officer Menke. Mr. DeSantis was a little closer to Sergeant Soares than to Officer Menke.

Mr. DeSantis tilted his body to the right briefly when he was hit with the Sage weapon, and then continued running towards Officers Menke and Mann. Mr. DeSantis took another two to four steps, moving three to four yards. When Sergeant Celli estimated that Mr. DeSantis was now six to eight yards away from Officer Menke, he shot Mr. DeSantis. **Sergeant Celli could still see that Mr. DeSantis had nothing in his hands.** Sergeant Celli was concerned that Mr. DeSantis would kill Officers Menke and Mann by either pulling out a

weapon or taking one of theirs. After he was shot, Mr. DeSantis took another step or two. Two more shots were fired at Mr. DeSantis, one by Officer Menke and one by Officer Mann. **About one and a half minutes passed between when Sergeant Celli first saw DeSantis and when he shot him. DeSantis died on the scene.**

During the incident, Sergeant Celli had a baton on him. There were at least two other officers with a Taser and Officer Ellsworth had a police canine with him. (Petition, Appendix B, pp. 12a-18a)

The Ninth Circuit distilled the facts as follows:

> Both Patricia DeSantis and the dispatcher informed the police that Richard was mentally ill. Patricia also informed the officers that Richard was unarmed and the gun was in the house. The officers could see Richard's hands at all times, and could see he was not hiding a weapon in his waistband. Richard never threatened to inflict, and did not inflict, harm to his family or to the officers. He was outnumbered six to one by police officers. When Sergeant Celli shot him, Richard was at least ten yards away from the nearest officer, and was walking towards them with a shattered right arm. None of the officers ever warned Richard that they would shoot him if he did not stop. The six officers could have used the Sage weapon again, or their Tasers, or their batons, or the dog.

(Petition, Appendix A, pp. 3a-4a)

Opinions Below

In an unpublished Memorandum the Ninth Circuit held factual disputes precluded summary judgment on qualified immunity. "Taken in the light most favorable to the Plaintiffs, **the facts in this case raise a triable issue of fact as to whether the officers who fired lethal shots at Richard DeSantis used excessive force.**" (Petition, Appendix A, p. 4a)

The Ninth Circuit affirmed the district court's ruling. The district court's order included a thorough analysis of the totality of the circumstances confronting the officers.

> **Upon reviewing the record in this case, the Court concludes that it cannot grant summary judgment for either party on this issue.**
>
> . . . .
>
> **On the other hand, viewing the evidence and all reasonable inferences in the light most favorable to Plaintiffs, a reasonable juror could find that the amount of force used was unreasonable.** Mrs. DeSantis informed the dispatcher and the officers on the scene that Mr. DeSantis did not have a gun anymore. By shooting up into the empty attic, Mr. DeSantis did not inflict, or threaten to inflict, serious physical harm. Mr. DeSantis never threatened his family members or any officers with the gun. Mr. DeSantis was bipolar and was in mental

> crisis. Mr. DeSantis was outnumbered by the officers on the scene by six to one. The officers were all armed, at least two officers had Tasers, one officer has a Sage, and another officer had his K-9 dog with him. Although Sergeant Celli initially did not order the dog or the Tasers to be used because Mr. DeSantis had been compliant and was too far away for the Taser, those circumstances changed when Mr. DeSantis started running towards the officers. When Sergeant Celli shot Mr. DeSantis, he was still six to nine yards away from Officers Menke and Mann. Mr. DeSantis' hands were visible and he did not have a weapon in them. There is no evidence that any of the officers warned Mr. DeSantis that he would be shot if he kept running towards the officers. **Based on the totality of the circumstances, the Court finds that a reasonable juror could easily find that the use of deadly force against Mr. DeSantis was not reasonable.** (Petition, Appendix B at p. 26a)

The district court applied qualified-immunity standards to the facts and, drawing inferences in plaintiffs' favor, denied qualified immunity.

> Again, viewing the facts in the light most favorable to the Moving Plaintiffs, Mr. DeSantis had not threatened any of his family members or any officers with a gun, he was mentally disturbed, he was not given any warning of the imminent use of force, let alone deadly force, and he did not present an objectively reasonable immediate threat of

> death or of serious injury to the officers at the time of the shooting. Moreover, the Court finds it significant that several alternative methods of capturing or subduing Mr. DeSantis were available. As Mr. DeSantis came closer, the Tasers could have been used. Moreover, the canine could have been used to stop him. With no weapon, Mr. DeSantis did not pose a serious threat of killing one of the officers until he reached them and was able to wrestle a gun away. Yet, Mr. DeSantis was shot when he was still almost 20 feet away from the closest officer. In light of such circumstances, under clearly established law, a reasonable officer could not have believed that using deadly force against Mr. DeSantis was lawful. (Petition, Appendix B at pp. 27a-28a)

REASONS FOR DENYING THE WRIT

The Ninth Circuit and district court, in unpublished decisions, denied summary judgment because a jury should determine whether defendants reasonably believed DeSantis was armed and therefore posed an imminent threat. It is well established that qualified immunity cannot be granted where the record sets forth a genuine issue of fact for trial. *Johnson v. Jones*, 515 U.S. 304 (1995); *Behrens v. Pelletier*, 516 U.S. 299 (1996).

Petitioners represent to this Court that they are entitled to qualified immunity because the officers

believed decedent was armed. This material fact is in dispute as determined by both the trial court and the Ninth Circuit.

This is *not* a case where there is a Circuit split or deviation from legal standards. United States Supreme Court Rule 10. Nor is it a case where any court cited an improper rule of law. Instead, petitioners raise issues which turn on factual disputes.

I. MISREPRESENTATIONS OF MATERIAL FACTS

It is disputed whether, after observing DeSantis for over a minute and a half, any officer *reasonably* believed DeSantis was armed. There is a difference between a subjective belief that someone *might* have a weapon and a reasonable belief that a suspect is armed. Petitioners ignore this important distinction and merge the two. Respondents dispute that Sgt. Celli believed, prior to pulling the trigger, DeSantis was armed. Instead, this was a self-serving post-hoc justification. Sgt. Celli's credibility and intent are at issue. Simply because Mr. DeSantis *could have been* armed in the hypothetical does not lead to the conclusion that Sgt. Celli *reasonably* believed that DeSantis was armed. If Sgt. Celli believed DeSantis was a threat because he was armed, why did he wait for almost two minutes to shoot him?

It is also disputed whether the Sage, a less lethal projectile which shattered DeSantis's arm, "deterred his progress," and whether Mr. DeSantis "charged" or

stumbled forward after he was hit and wounded by the Sage.[1]

II. CONSIDERATION OF OTHER FORCE ALTERNATIVES MAY BE PROPER WHERE A SUSPECT IS UNARMED

Petitioners acknowledge that *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) sets forth the appropriate standard and permits courts to consider the "availability of other force alternatives" as "a factor" to analyze the reasonableness of the use of force. Petitioners contend lethal force was justified because it was a "split-second" decision made by officers who reasonably believed their lives were at risk. Accordingly, they argue that other alternatives should not have been considered based on Fourth, Sixth and Ninth Circuit precedents.

Factually this argument is flawed. **First**, it is disputed whether the officers reasonably believed their lives were at risk. **Second**, neither the district court nor the Ninth Circuit relied *exclusively* on the alternatives available to the officers. Rather, they were a factor to consider. **Third**, because no officer ever observed a weapon and DeSantis's hands were

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[1] The issue whether DeSantis was running or walking before he was wounded by the Sage has little significance. An unarmed man, with hands visible, does not become a deadly threat to six officers and a police dog by simply running in their direction.

visible at all times, numerous alternatives were available. Six officers had a variety of non-lethal weapons at their disposal and a dog.

The Ninth Circuit correctly noted that:

> Although officers are not required to use the least intrusive degree of force available, *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994), "the availability of alternative methods of capturing or subduing a suspect **may** be a factor to consider." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (citation omitted) (emphasis added).

(Petition, Appendix A at p. 4a)

It goes without saying that an officer confronted with deadly force does not have to consider options before resorting to deadly force. However, the issue becomes more complex if a suspect is unarmed and it is disputed whether the officer reasonably believes the suspect is armed. Here reasonable inferences can be drawn that this was not a split second decision by officers who reasonably believed their lives were at risk.

III. THERE IS NOT A CONFLICT BETWEEN THE CIRCUITS REGARDING THE USE OF DEADLY FORCE

The law regarding the use of deadly force by law enforcement officers has been well established for over 20 years. Principles of self-defense and defense of others goes back to the common law. The reported

decisions are distinguishable by their unique set of facts, yet the legal principles involved have remained constant. Because each case requires a fact-specific analysis, it is overly simplistic to argue a conflict exists between Circuits simply because in some cases qualified immunity is granted and in others it is not. Cases reaching different results can be distinguished by their facts and the "totality of circumstances."

Claims that law enforcement officers used excessive force when making an arrest "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. O'Connor*, 490 U.S. 386, 395 (1989). The standard of review is an objective one. The question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force. *Id.* at 396-97. A police officer may use deadly force when the officer has sound reason to believe that a suspect poses an imminent threat of serious physical harm to the officer or others. *Tennessee v. Garner*, 471 U.S. 1 (1985).

Petitioners' reliance on cases from the Sixth and Fourth Circuits is misguided. In *Smith v. Fretland*, 954 F.2d 343, 347 (6th Cir. 1992), an officer shot and killed a suspect, following a high-speed chase. It was undisputed that the suspect was: (1) running through a stop sign; (2) exceeding 90 m.p.h. on public streets; (3) attempts on two occasions of ramming into a police car; (4) fleeing for 2.5 miles; (5) turning his car on a residential lawn; and, (6) intentionally crashing into the front of a police car. *Id.* at 349. The *Fretland*

court held the officer acted reasonably and granted qualified immunity based on a *lack of disputed facts* regarding the preceding events which justified the reasonableness of his actions.

Because of the unique facts of *Fretland*, the Sixth Circuit acknowledged it cannot "give significant weight to *Fretland* in evaluating the specific facts" of other cases. *See, Sigley v. City of Parma Heights*, 437 F.3d 527, 535-36 (6th Cir. 2006). The Sixth Circuit also distinguished *Fretland* based on disputed facts about the circumstances preceding the shooting. When "there is a question regarding whether the officer could reasonably have believed that anyone's life was endangered" by the suspect's actions and the officers did not perceive any "willingness to harm an officer or engage in reckless behavior," summary-judgment on qualified immunity is improper because "based on the plaintiff's version of the facts, a jury could find that no reasonably competent officer would have shot the victim." *Murray-Ruhl v. Passinault*, 246 Fed.Appx. 338, 346, 2007 WL 2478584, *7 (6th Cir. 2007).

The Ninth Circuit distinguished *Smith v. Fretland* when officers fail to issue any warning and have no objectively reasonable belief there is a need for self defense.

> On the facts presented by the Adamses and the disciplinary report of the CHP itself, a jury could find Speers to be an officer off on a mission of his own creation, abandoning his assignment, picking up a buddy for no

> apparent reason except the excitement of the chase, barging in ahead of the police already engaged in pursuit, once attempting to use force against Alan and twice doing so, creating each time a serious hazard for himself as well as Alan, and finally stepping out of his patrol car and, **without warning and without the need to defend himself or the other officers**, killing Alan. Shooting of this sort was established as unconstitutional by *Tennessee v. Garner, supra,* almost twenty years ago. *See Vaughan v. Cox,* 343 F.3d 1323 (11th Cir. 2003), *on remand from* 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002). No officer acting reasonably in these circumstances could have believed that he could use deadly force to apprehend Alan.

Adams v. Speers, 473 F.3d 989, 993 (9th Cir. 2007) (emphasis added).

In *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996), the facts preceding the shooting justified the court's ruling on qualified immunity. An intoxicated decedent Elliott pointed a gun at the officers "from only a few feet away with his finger on the trigger" and ignored their command to drop the weapon just prior to the shooting, when his hands were out of sight and the weapon had not been removed. *Id.* at 643-44. The critical point is that Elliott was "threatening the lives of the officers at whom he pointed the gun." *Id.* at 643.

Unlike *Elliott*, here the officers never issued any commands to stop, had Mr. DeSantis's hands in their

view at all times, never saw a gun, and had no information DeSantis had threatened anyone.

IV. THE COURT DID NOT DEVIATE FROM WELL ESTABLISHED PRECEDENT REGARDING THE FOURTEENTH AMENDMENT CLAIM

Notably, the defendants/petitioners did not raise the Fourteenth Amendment claim in their motion for summary adjudication. In its Order the district court held that:

> Parents and children of a person killed by law enforcement officers may bring this substantive due process claim. To prevail on such a claim, Plaintiffs must demonstrate that the officers' use of force "can properly be characterized as arbitrary or conscious shocking, in a constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1988). To meet this standard, Plaintiffs must show that the officers were motivated by a purpose to cause harm that was unrelated to the legitimate object of their use of force. *See also*, *Porter v. Osborn*, 546 F.3d 1131, 2008 WL 4614334, *5 (9th Cir. 2008). Neither Moving Plaintiffs nor Defendants addressed whether the claims by Dani and/or Adrienne meet this stricter standard in their motions. Accordingly, the Court denies both motions to the extent they seek summary judgment

> on the claims by Dani and/or Adrienne against the Defendant Officers.

(Petition, Appendix B, p. 29a)

Since the decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the law has been clearly established in the Ninth Circuit regarding the test to apply in substantive due process claims alleging violations of the Fourteenth Amendment. *Cf. Moreland v. Las Vegas Metro Police Dept.*, 159 F.3d 365 (9th Cir. 1998) and *Porter v. Osborn*, 546 F.3d 1131 (9th Cir. 2008). The petitioners do not contend that the Ninth Circuit and district court did not apply the correct law to this case. Rather, petitioners contend that they are entitled to qualified immunity because they made a split-second decision to fire believing DeSantis was armed and posed an imminent threat to them. However, the evidence can be reasonably viewed to infer that this was not a split-second decision and the officers did not believe that DeSantis was armed. While it is true that it takes less than a second to pull the trigger, DeSantis had been observed for over a minute and a half, his hands were clearly visible, and no one saw a weapon.

If the officers believed that DeSantis was not armed and wounded, a jury could infer a purpose to cause harm unrelated to a legitimate police purpose. The Ninth Circuit held that: "Genuine issues of material fact remain to be resolved in determining whether the officers were motivated by a purpose to

cause harm that shocks the conscience." (Petition, Appendix A, p. 4a)

CONCLUSION

For the foregoing reasons, this Court should not grant review and the petition should be denied.

Dated: December 29, 2010

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No. 10-434

IN THE

Supreme Court of the United States

CITY OF SANTA ROSA; RICHARD CELLI, Police Officer; TRAVIS MENKE, Police Officer; and PATRICIA MANN, Police Officer of the SANTA ROSA POLICE DEPARTMENT,

Petitioners,

v.

PATRICIA DESANTIS, Guardian Ad Litem; RICHARD DESANTIS, deceased, and as Guardian Ad Litem; DANI DESANTIS, a minor, TIMOTHY FARRELL, a minor; DRIANNE DESANTIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

Pursuant to Supreme Court Rule 15.6, Petitioners City of Santa Rosa, Richard Celli, Travis Menke and Patricia Mann submit the following Reply Brief in support of their Petition for Writ of Certiorari.

I. THE PETITION INVOLVES IMPORTANT ISSUES OF LAW AND NOT DISPUTED ISSUES OF FACT

Respondents inaccurately attempt to characterize this case as one involving triable issues of fact surrounding the issue of qualified immunity for obvious reasons. There is no genuine dispute over the material facts in this case that are necessary to resolve the issue of qualified immunity. Respondents attempt to mischaracterize the issue of reasonableness as a factual issue. Whether the Petitioners were entitled to qualified immunity is a question of law to be determined by the court. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 502 U.S. 224 (1991); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

The facts that are not in dispute are:

1. The entire incident transpired in approximately two minutes from the time the officers arrived on scene until shots were fired;

2. The officers were responding to a call of shots fired in a residence by Mr. DeSantis in which Mr. DeSantis's wife and children were present;

3. Additional shots were fired while the officers were en route;

4. The officers had not had any opportunity to search Mr. DeSantis for weapons;

5. The officers gave commands to Mr. DeSantis to stay down on the ground – he failed to comply;

6. Mr. DeSantis unexpectedly and suddenly jumped up and charged at the officers who had their weapons drawn on him;

7. A less lethal use of force failed to stop Mr. DeSantis from advancing on the officers;

8. The officers were required to make a split second decision whether to use deadly force to protect themselves from what they perceived as a threat to their safety, the safety of their fellow officers and the public at large;

9. The officers did not take any action prior to Mr. DeSantis unexpectedly charging at them to provoke him or escalate the situation.

After the fact, it was discovered that Mr. DeSantis did not have a weapon on him. Even without a visible weapon, Mr. DeSantis still presented a real and potential threat to the officers whom he could have overpowered and taken their weapons. A reasonable mistake of fact by the officers assessing the situation is precisely the type of situation which the doctrine of qualified immunity is intended to protect the officers from. *Pearson v. Callahan* ___ U.S. ___; 172 L.Ed 565; 129 S.Ct 808 (2009). The correct inquiry is not "whether another reasonable or more reasonable interpretation

of the events can be constructed . . . after the fact." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

The real issues as identified in the Petition are over the appropriate standards used to determine whether the officers acted reasonably, and are therefore entitled to qualified immunity.

As more specifically articulated in the Petition, Petitioners contend that there is a lack of clarity in existing legal precedent as to the appropriateness of a court's consideration of other force alternatives available to an officer, or other officers present at the scene, who are forced to make a split second decision when a suspect is a threat to the officers. There is no precedent in any Federal Circuit Court which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force is ultimately justified. There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to first use non-deadly alternatives. *Plakas v. Drinski*, *supra*, 19 F.3d 1148 (7th Cir. 1994). This holds true in the Ninth Circuit as well. *Scott v. Henrich*, *supra*, 39 F.3d at 915 (9th Cir. 1994). This court should resolve any doubt regarding this issue.

Here, there is no clear authority that would have placed the officers on notice that under the circumstances presented in this case, that they were violating Mr. DeSantis's constitutional rights. Thus, even assuming arguendo, a constitutional violation could be shown, the officers would still be entitled to qualified immunity because the law was not clearly established.

Saucier v. Katz, 533 U.S. 194, 200; 121 S.Ct. 2151; 150 L.Ed.2d 272 (2001).

The court should also be aware of the similarity of issues raised by another Petition pending before the court: *William Morris Jr., et al. v. Robert Swafford*, 2010 WL 3422565 (C.A. 11 (Fla)) petition for cert. filed November 29, 2010 (No. 10-712). In *Morris*, an Eleventh Circuit case, two sheriff deputies were searching a large open field for felony car burglars when they were confronted by the plaintiff Robert Swofford who had a gun. The deputies shot Swofford, who was approximately 20-25 feet away from the deputies at the time he was shot, believing that he would fire at them and that their lives were in danger. The petition raises the question as to whether a pre-use of force warning as discussed in *Tennessee v. Garner*, 471 U.S. 1 (1985) should apply in a self defense case where there is no time to give a warning. The petition in *Morris* points out, similar to the petition here, that this Court has not articulated the standard for evaluating the use of deadly force when a suspect armed, or reasonably believed to be armed, is approaching, as opposed to fleeing, and presents a direct threat to the officer which forces the officer to make a split second decision in order to protect themselves.

II. THE PETITION PRESENTS IMPORTANT ISSUES OF PUBLIC POLICY WHICH THE COURT SHOULD PROVIDE CLEAR GUIDANCE AND DIRECTION ON TO THE LOWER COURTS

Although this court recognized in the seminal case of *Graham v. Conner*, 490 U.S. 386(1989) this type of scenario in which officers are force to make these split

second type of decisions under tense circumstances– "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments–in circumstances that are tense, uncertain and rapidly evolving–about the amount of force that is necessary in a particular situation."– no specific authority has articulated in a clear and meaningful manner the appropriate factors to be considered when a suspect is advancing on an officer causing an imminent threat of harm. The lower courts need guidance as to the appropriate factors to evaluate the constitutionality of deadly force in such circumstances understanding that the perspective from which such conduct should be judged is that of the officer on the scene and not from 20/20 hindsight. *Graham., id* at 394.

As pointed out by the Petition in *Morris,* the analysis in *Garner,* which is a completely different scenario from that at issue in this case and in *Morris,* fails to provide sufficient guidance to the courts in making this evaluation.

Additionally, this Court should make clear that, consistent with its prior rulings on the issue of qualified immunity, considerations of other force alternatives in the scenario presented in this case are not appropriate in evaluating the entitlement to qualified immunity.

As pointed out by Justice O'Scannlain in the dissenting opinion below, the qualified immunity doctrine would serve no purpose if it was applied in the manner it was by the Ninth Circuit below (Dissent, page 6, Appendix A to Petition). Officers should not be forced to unnecessarily risk their lives out of fear of being sued

for making a split-second decision to protect themselves. The officers in this case did absolutely nothing to provoke or cause Mr. DeSantis to unexpectedly charge at them and had valid reasons to believe that he was armed at the time and that their lives were in danger. Their actions should not be judged from the 20/20 hindsight of knowing that in fact Mr. DeSantis was not armed at the time or having the luxury of time to consider other alternatives–valuable time that the officers did not have when forced to act.

CONCLUSION

Petitioners respectfully request for the reasons set forth herein and in their Petition that the court grant certiorari to review these important public safety and constitutional issues.

Respectfully submitted,

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